

**COMMITTEE ON SUPERIOR COURT
MINUTES**

Friday, February 3, 2012
Arizona State Courts Building
Conference Room 119A/B
1501 W. Washington Street
Phoenix, AZ 85007

Present: Judge David Mackey, Chair; Judge Eddward Ballinger, Judge Michael Burke, Judge James Conlogue, Judge David Cunanan, Judge Richard Gordon, Sue Hall (*telephonically*), Joshua Halversen (*telephonically*), Judge Celé Hancock, Judge Charles Harrington, Judge Carey Hyatt (*telephonically*), William Klain, Esq. (*telephonically*), Judge Kenneth Lee, Judge Colleen McNally, Patricia Noland, Marcus Reinkensmeyer, Judge Michala Ruechel, Judge Monica Stauffer, Judge Randall Warner, Susan Wilson

Absent/Excused: Judge Robert Duber, Tim Hardy, Judge Joseph Lodge

Presenters/Guests: Amy Love (AOC), Todd Franks, Esq. (member of the Domestic Relations Committee), Kathy Sekardi (AOC), Janet Sell (Office of the Attorney General), Nancy Swetnam (AOC), Cindy Trimble (AOC), Patrick Scott (AOC), Betty McEntire (Executive Director, Secretary of State's Address Confidentiality Program), Lucy Mason (Assistant Director, Secretary of State's Address Confidentiality Program), Mark Meltzer (AOC), Jennifer Greene (AOC)

Staff: Kay Radwanski (AOC), Julie Graber (AOC)

I. REGULAR BUSINESS

A. Welcome and Opening Remarks

With a quorum present, the February 3, 2012, meeting of the Committee on Superior Court (COSC) was called to order at 10:03 a.m. by Judge David Mackey, chair. Judge Mackey welcomed members to his first meeting as COSC chair and took a moment to remember Justice Michael Ryan after his untimely passing on January 30, 2012. The chairman thanked Judge James Soto for successfully leading COSC over the last six years and leaving behind a highly regarded committee for him to head. Judge Mackey then discussed his plans and goals to direct the committee going forward.

Judge Mackey reviewed the remaining 2012 COSC meeting dates:

- May 18, 2012
- September 7, 2012
- November 2, 2012

B. Approval of Minutes

The draft minutes from the November 4, 2011, meeting of the COSC were presented for approval.

Motion: To approve the November 4, 2011, meeting minutes as presented. **Action:** Approve, **Moved by** Judge James Conlogue, **Seconded by** Judge Monica Stauffer. Motion passed unanimously.

II. BUSINESS ITEMS/POTENTIAL ACTION ITEMS

A. Legislative Update

Amy Love, AOC legislative liaison, discussed proposed legislation that may impact the superior courts and sought input from COSC members.

HB2297: probation; community supervision; violations; revocation

Mandates that a defendant must commit two or more offenses or condition violations (instead of only one) before community supervision may be revoked or before conditions may be modified by the court or the Board of Executive Clemency. Ms. Love reported concerns that this proposal would undo work already done with the probation's evidence-based practices. This bill will probably not go forward.

HB2398: judicial actions; children; names; redaction

Requires the court to assign a letter instead of a child's name in orders and minute entries that relate to specific domestic relations cases and specifies who may access the information and under which circumstances this information may be disclosed. Ms. Love indicated that this bill is directed at Maricopa County's online minute entries and was introduced in response to a constituent's concerns about a minute entry containing children's names and dates of birth as well as information about their mental and physical health conditions. Ms. Love stated that the bill as drafted presents a number of problems and the AOC has been working with Rep. Katie Hobbs on finding a resolution. While Rep. Hobbs is open to conversation, she is also intent on obtaining a solution. The AOC would prefer proceeding by rule change rather than by legislation. Ms. Love requested that members forward any feedback directly to her.

HB2432: secured appearance bond exoneration; remission

Mandates that the surety be relieved from liability if a defendant who failed to appear is surrendered by the surety or bail bonds agent within 30 days and requires the surrender to be reported to the court by affidavit. Ms. Love reported that the language should be amended to allow a judge discretionary authority to extend the time limit that the defendant is allowed to appear before forfeiting the bond. Additional Arizona Bail Bondsmen Association bills related to pretrial services and restricting cash bonds are dead.

HB2556: criminal restitution order

Expands the court's subject matter jurisdiction relating to criminal restitution orders to include enforcement activities. Ms. Love pointed out that this bill was introduced last year but did not go anywhere and is now being reintroduced by the Attorney General's Office. Jerry Landau is working with the sponsor to address problems in the bill.

SB1080: grand jury; length of term

Increases the term grand juries serve in counties with less than 200,000 persons from 120 to 180 days. Ms. Love reported that this proposed legislation is moving forward.

SB1100: adoption; visitation pending final decree

Adds rights for prospective adoptive parents during the adoption process that relate to the child's placement and to notification of an appeal of the termination of the birth parent's parental rights; limits visitation with a child by a birth parent if that parent's rights have been terminated; and presumes that continued visitation would not be in the best interests of the child. Ms. Love reported that there have been several issues with how to proceed procedurally with the language about the appeal notification of the birth parent's parental rights termination, such as putting the burden on the birth parent and including the adoptive parent as a party. Ms. Love sought input from members.

SB1142: jurors; Arizona lengthy trial fund

Modifies the time a juror begins receiving replacement of earnings from the Arizona Lengthy Trial Fund from the fourth day of service to the first day. Ms. Love confirmed that there are sufficient funds in the LTF to afford this proposal.

Sue Hall questioned the potential impact of this proposal. Ms. Love stressed that the five-day trial requirement would still remain; a juror would just be paid back to the first day instead of the fourth day.

SB1152: homeless court; establishment; jurisdiction

Allows the presiding judge of the superior court to create a consolidated homeless court for the referral of cases from a municipal or justice court and requires the presiding judge to establish eligibility criteria for referral to the homeless court. Ms. Love anticipated an amendment to remove the requirement that the prosecutor "approve" referrals and replace with "be notified" in criminal cases. This AJC bill is moving forward.

SB1311: civil actions; justice courts; jurisdiction

SCR1032: justice courts; civil action; jurisdiction

Increases the jurisdictional limit over civil actions in justice of the peace courts from \$10,000 to \$25,000, which is conditional on a constitutional amendment. Ms. Love advised that there would be an amendment to change the limit from \$25,000 to \$15,000.

SB1371: justices and judges; elections

SCR1034: judicial elections

Repeals merit selection of justices and judges and replaces with election.

SB1372: appeals court; size; fees distribution

Reduces the number of judges in the state's Court of Appeals from 22 to 6 and cuts funding to the court from 8.36% to 1%.

A question was raised about the status of SB1371 and SB1372. Ms. Love reported that the bills have just been referred to the Senate Judiciary Committee but are not expected to move in the next week.

B. SB1246 Child Support; Supreme Court; Factors

Todd Franks, Esq., member of the Domestic Relations Committee (DRC), presented the DRC's proposed changes to A.R.S. § 25-320(D) relating to child support factors, which are reflected in Senate Bill 1246. After providing some background information and definitions, Mr. Franks explained that the proposed changes are necessary to address anecdotal claims as well as concerns submitted to the DRC that the current language might be inappropriate, but he clarified that the proposed changes are not intended to make any substantive changes to the Child Support Guidelines. Mr. Franks compared the DRC's proposed changes and the Senate bill language to determine whether the DRC's concerns were satisfied. He sought input and feedback from various stakeholders, including COSC, to bring back to the DRC.

1. First anecdotal claim: Superior Court judges disregard the guidelines and make decisions based on their own application of the child support factors in A.R.S. § 25-320(D), resulting in substantial deviation of child support awards. The DRC language clarified that child support factors were intended for the Supreme Court and were not to be considered by the Superior Court when making child support orders. This language satisfied the DRC's concerns. Mr. Franks noted that the bill language moved the proposed language to paragraph Q and now incorrectly states that the *Supreme Court* may not use these factors when making child support orders; however, the Superior Court makes child support orders, not the Supreme Court. He stressed that at a minimum, the bill language must be fixed in paragraph Q so the "Supreme Court" is replaced by the "Superior Court."
2. Second anecdotal claim: Superior Court judges focus exclusively on the "standard of living factor" (A.R.S. § 25-320(D)(3)). The DRC included language in the preamble stating that all relevant factors should be considered comprehensively rather than focusing on a specific factor. Although the DRC language was modified in the bill, it still satisfies the DRC's concerns.
3. Concerns about the current language in A.R.S. § 25-320(D)(3): The DRC had concerns about the appropriateness of the language in this section because the "standard of living factor" is not achievable economically for most families once an "intact home" no longer exists and because the language distinguishes between married couples and paternity cases when in fact the Child Support Guidelines apply to both. Mr. Franks reported that the DRC's proposed changes included expectations for both types of parents, which met the concerns without substantively changing the guidelines. Although the DRC language was modified in the bill, it still satisfies the DRC's concerns.

Judge Ballinger questioned expansion of the standard of living factor to apply to both married parents and paternity cases. He said he understood this factor to be a way to address cases in which huge disparities exist between parents' resources. Mr. Franks responded that the standard of living factor is not really being expanded because there is one set of guidelines that applies the same for divorced parents and for paternity cases. Superior court judges are obligated to follow the Child Support Guidelines in paternity cases. The child support factors are part of the enabling statute for the Supreme Court and

do not apply to judges. Additional concerns were raised about the standard's complexity. There was a suggestion to use more general language such as "the appropriate standard of living for the child should reflect the parent's standard of living."

C. Update on Probate Project

Nancy Swetnam, director of the Certification and Licensing Division, updated members on the progress of the Committee on Improving Judicial Oversight (Probate Committee) in implementing its final report and recommendations. Ms. Swetnam outlined proposed rules changes that resulted in part from significant amendments recently adopted with an effective date of either February 1, 2012, or September 1, 2012. She focused on the provisions that will be distributed for public comments in February and March, which will then return to COSC for consideration at the May meeting in anticipation of AJC's meeting in June.

Ms. Swetnam identified two new proposed sections (ACJA § 3-302: Probate Forms and ACJA § 3-303: Fee Guidelines) that correspond to the amendments in Probate Rule 38. The existing forms in Rule 38 will be moved to ACJA § 3-302, which will also incorporate new forms and instructions related to new filing requirements. ACJA § 3-303 will consist of the proposed fee guidelines for attorneys and fiduciaries, which was the subject of much debate in the Probate Committee. Ms. Swetnam reviewed proposed amendments to ACJA § 7-202: Fiduciaries, which are needed to comply with Rule 31, Rules of the Supreme Court, and to specify which authorized actions a licensed fiduciary may take without the assistance of counsel. Ms. Swetnam finally addressed issues related to training requirements that must be in place by the September effective date and affect judicial officers, court investigators, court-appointed counsel and non-licensed fiduciaries. She reported that some questions remain unanswered but assured members that many people are working to have something in place before the September deadline.

Judge Stauffer inquired as to when the training would take place. According to Ms. Swetnam, Education Services is working to provide training by video for non-licensed fiduciaries and electronic training for court investigators that will be in place and available before September 1. She expected the judicial training to be available at the Judicial Conference and indicated that COJET is looking at perhaps offering the training but no decision has been made. Ms. Nolan suggested including probate registrars, which Judge Harrington supported as well. Judge Harrington advised that he just met with Paul Julien, Education Services, who is assembling the components of the judicial training program, which will be included at the Judicial Conference.

D. Secretary of State's Address Confidentiality Program

Patrick Scott, AOC specialist, described the Secretary of State (SoS)'s Address Confidentiality Program and discussed the impact of the new provisions on the courts along with some of the policies that were developed in an ad hoc workgroup he staffed to address implementation issues. Mr. Scott explained that a new law mandated the SoS to establish and maintain the program in order to provide a substitute address to victims of domestic violence, sexual offenses and stalking to maintain confidentiality of their location. Mr. Scott announced that a statewide memo will be sent out at the beginning of

May in advance of the program's May 31, 2012, implementation date with questions and answers about the program.

Mr. Scott provided further details about the program's provisions and how they will affect the courts and business processes. Program participants are responsible to notify the courts about their participation in the program unless a participant notifies the SoS that he or she is a party to a family court matter, in which case the SoS will send notification to the court. A program participant may provide their confidential address card when coming to the court, which the court must accept, copy, and use. Mr. Scott clarified that a participant's actual address may be obtained by the court on an expedited basis only if it is necessary for court business. Once the address is released to the court, the address must be maintained as confidential by the court, and it may be sealed in the court's record. Mr. Scott warned that that address is not a public record and it is a class 1 misdemeanor to release it knowingly. He underscored the importance for courts to have a policy in place regarding requests for release and recommended that anytime a request is made for release of the participant's real address, it must be on court letterhead and go to the program director in order to protect the courts.

Mr. Scott reviewed implementation concerns that were discussed in his workgroup. Patricia Noland, who participated in the workgroup, raised concerns about the timeliness of notices when they are sent by "snail mail" and encouraged electronic distribution of court documents to SoS. Mr. Scott related other concerns voiced in the workgroup regarding proper party notification when dealing with family court notices. The workgroup suggested that notices go back to the clerk instead of the court because the clerk is the record keeper and that an email inbox be setup so SoS could notify the clerk of any new program participants. Mr. Scott then addressed the question about whether the program satisfied the rules of service. When he reviewed the program step-by-step, he noted that the new law designated SoS as the agent, and under the law, an agent has the authority to accept service. Mr. Scott then concluded that SoS is the agent under the new law and can accept service, which satisfies the rules of service. Mr. Scott finally alerted members to a new requirement that calls for redaction of a participant's actual address from court documents filed up to 90 days prior to the application date. This requirement applies to all government agencies and will affect clerks and courts.

Betty McEntire, SoS executive director, reacted favorably to the electronic distribution suggestion and indicated that SoS is open to discussion before finalizing any details. Several members anticipated issues, such as a court knowing a participant moved and that SoS would be unable to forward the documents to the participant. According to Mr. Scott, SoS will notify the court when that occurs and will return the piece of mail to the court. He noted that if a participant fails to notify the SoS of a change of address, he or she will no longer be part of the program. After the court receives notification, Mr. Scott indicated that courts would proceed as they normally do to effectuate service on parties.

E. Rule 28 Petitions Filed

Mark Meltzer, AOC senior policy analyst, presented an overview of rule petitions that relate to the superior court and that have been filed in the current rules cycle for

consideration during the 2012 Supreme Court rules agenda in August. He encouraged members to participate in the rulemaking process and invited the committee to discuss the submission of comments on particular rule petitions of interest. The deadline to file comments is May 20, 2012. All of the rule petitions can be reviewed on the Court Rules website. Members wishing to file comments on new rule petitions should visit the [Court Rules Forum](#).

Civil Rules of Procedure

R-11-0017
R-11-0018
R-11-0031
R-11-0032
R-11-0034
R-11-0035
R-11-0037
R-11-0038
R-11-0042
R-11-0044
R-12-0008
R-12-0021
R-12-0022

Other rules of interest

R-12-0001
R-12-0002
R-12-0006
R-12-0020

Criminal Rules of Procedure

R-11-0016
R-11-0027
R-11-0040
R-11-0045
R-12-0004
R-12-0009
R-12-0015
R-12-0016

Rules of Evidence

R-11-0039

Probate Rules

R-12-0014

Rules of Procedure in Juvenile Courts

R-12-0012

Rules of the Supreme Court

R-11-0024
R-11-0033
R-11-0046
R-12-0003
R-12-0017

Protective Order Procedure

R-11-0043
R-12-0007
R-11-0043
R-12-0023
R-12-0013

Mr. Meltzer reported that the biggest category of rule petitions this year was civil rules, and he reviewed the civil rules petitions that were more controversial. Mr. Klain shared several positions that were taken by the State Bar of Arizona’s Civil Practice Procedure Committee (SBA committee).

1. **Civil Rules of Procedure**

R-11-0031: Simplifies service of process on a governmental subdivision and allows service on an administrative assistant or on one member of a public entity’s governing group rather than on every member.

Many comments have been received on the Court Rules Forum supporting this petition. Mr. Klain said the proposed rule change could create further problems, and the SBA committee will be suggesting a different approach.

R-12-0008: Addresses service-related issues from the AZ Process Servers Association; defines “suitable age and discretion” as appearing 15 years of age; service at a planned community by leaving a copy with the guard; substituted service at a usual place of business by leaving a copy with the person who appears to be in charge.

Mr. Klain indicated that the SBA committee just approved a comment opposing this petition. There is substantial case law defining suitable age and discretion, and appearing as 15 years of age overlooks developmental problems and other

factors. Leaving a copy with the guards at a guarded community does not ensure the party will actually receive notice. Finally, using a method of service that is available post-case initiation and applying it to the initial process of service is problematic as well. He indicated the SBA committee is unlikely to support this petition.

R-11-0034: Makes extensive and complex changes to Rule 56 on motions for summary judgment. A new subsection H would allow summary dispositions on the court's own initiative. The Arizona rule would conform more fully to federal law.

Mr. Klain commented that the standards for summary judgment have not changed, and new subsection H codifies already existing Arizona case law. The petition is intended to curb abuses and unreasonable delay tactics. The petition was a bit controversial but the SBA committee ended up supporting it.

R-11-0017: Allows litigators to interact freely with their experts by extending work-product communications.

Mr. Klain reported that after a close vote, the SBA committee drafted comments supporting the petition. He was unsure whether the Board of Governors (BOG) would support their comments.

R-12-0022: Implements the Uniform Interstate Depositions and Discovery Act and would require a process for litigants to conduct depositions and obtain discovery if the other party is located out of state.

Mr. Klain indicated that the review process is in its initial phases and a subcommittee is reviewing the proposal. He expected that the petition will likely be supported with some suggested revisions to ensure it conforms to Arizona's civil rules.

R-11-0018: Changes line requirements in documents from 28 lines to 22 to enhance readability.

One comment was filed opposing this petition. Mr. Klain indicated that the SBA committee prepared a draft comment opposing the petition that will be heard by BOG next week. He did not anticipate any controversy.

R-11-0037: Requires a response to an amended pleading only when it is reasonably required. The SBA committee is finalizing its comment opposing the petition.

For each of the following petitions, Mr. Klain either indicated the SBA committee would support or did not intend to take a position, or he did not state a position on the petition.

R-11-0032: Changes the timing when the master must file the conflicts affidavit. The SBA committee supported the petition.

R-11-0035: Eliminates "discharge in bankruptcy" as an affirmative defense that is waived if it is not pled in an answer. No SBA committee position was stated.

R-11-0038: Clarifies that the entry of default is automatic upon filing the application for default. The SBA committee worked with Judge Davis on this petition and prepared a comment supporting the petition.

R-11-0042: Eliminates the requirement to file an ADR report within 90 days after defendant appears. Mr. Klain commented that this requirement is widely ignored. Otherwise, no SBA committee position was stated.

R-11-0044: Removes requirement that parties file depositions upon written questions. The SBA committee is not taking a position.

R-11-0045: This is a clean-up petition that will allow for electronic filing of a document. No SBA committee position was stated.

R-12-0021: Changes the word “registered” to “certified” for private process servers who meet specific criteria. The SBA committee is not taking a position.

Mr. Meltzer provided a synopsis of rule petitions filed regarding criminal, probate, evidence and juvenile courts procedure rules.

2. Criminal Rules of Procedure

R-11-0016: Mr. Meltzer thought this petition might be of interest concerning the application of preclusion and the court’s lack of jurisdiction.

R-11-0027: Changes the word “amends” to “supplements” regarding allegations of enhancements.

R-11-0040: Would further protect juror privacy.

R-12-0004: This petition from COVIC was presented to COSC at the November meeting and would require the use of initials in lieu of a full name in cases where the victim was a juvenile at the time of the offense or was an adult victim of a sexual offense. Comments are due by April 2, 2012.

R-12-0009: Corrects inconsistency about notary requirement in Form 25 and Rule 32.5.

R-12-0015: Adds a deadline to file a motion for new finding of probable cause.

R-12-0016: Allows justice courts to handle deferred prosecution cases without superior court involvement.

3. Rules of Evidence

R-11-0039: Clean up petition on the Rules of Evidence. Adds change to Rule 508 regarding truthfulness of character and specific instances of conduct.

4. Rules of Procedure in Juvenile Courts

R-12-0012: Makes changes to juvenile rules to allow e-filing in appellate court.

5. Probate Rules

R-12-0014: Allows appearance by videoconference for hearings such as status conference, which would be especially good for court-appointed attorneys.

Mr. Meltzer reviewed rule petitions that affect the Rules of the Supreme Court with emphasis on the following petition:

6. Rules of the Supreme Court

R-12-0017: This petition from Judges Davis and Mroz requests that probate records be available to the public by remote electronic access and that proper identification should not be required to obtain remote access.

Ms. Noland, who was a member of the Rule 123 committee, commented that courts are not ready to allow public access to probate records from a technology standpoint. Furthermore, the purpose of requiring a driver's license to obtain access was to ensure that there was no unlawful access to probate records given the sensitive information contained in them. She reminded members about the individual who had his home loan application denied because of mental health information available online, which led to the probate records access shutdown in Maricopa County. Ms. Noland supported access to these records within the courthouse but clarified that parties are allowed remote electronic access to their own cases. Judge David Cunanan, who handles probate cases in Maricopa County, supported remote electronic access because it is a great inconvenience for the public to have to come to the courthouse, especially since access used to be allowed and safeguards are implementable to ensure records are properly redacted. Judge Mackey questioned whether all counties were ready. He also had concerns about going live even though Yavapai County is doing its best to ensure that records do not contain sensitive information.

R-12-0003: Clarifies provisions in Rule 123 regarding access to judicial records and adds prostitution and obscenity to Title 13.

R-11-0024: Shifts the burden to the lienholder to take action within a specific amount of time in personal injury cases where the attorney must hold the lienholder's proceeds until a determination is made by the lienholder but that determination may be part of a long bureaucratic process.

R-11-0033: Defines the ethical duties of the prosecutor when defendant may be wrongfully convicted.

R-11-0046: Allows law firms to use trade names; using the name of a deceased partner may be deceptive.

R-12-0018: Eliminates all of the categories for bias and prejudice in the comment in ER 8.4 to make the rule more inclusive.

Mr. Meltzer discussed rule petitions that relate to Rules of Protective Order Procedure.

7. Protective Order Procedure

R-11-0043: Requires a court that has issued a protective order to mail a copy of the proof of service to plaintiff within 24 hours of the court's receipt to ensure timely notice. Kay Radwanski, AOC senior policy analyst, who also staffs the CIDVC committee, commented that several issues were identified with this petition when it was presented to CIDVC. First, the petition's goal of timely notice would not be achieved because it could take nearly two weeks for the victim to receive notice when all the required days are counted. Second, it places a burden on the court to do extra copy and mailing, which may not be the best use of court resources if the petition's goal is not met. The process server,

whether a law enforcement agency or a private process server, would be the best party to provide the timely notice.

R-12-0007: Raises a constitutional issue on the criminalization of firearms possession.

R-12-0013: This petition from CIDVC, which prohibits public disclosure of a protective order prior to service of the protective order, was previously vetted at a COSC meeting.

R-12-0023: Raises issues previously rejected by the Supreme Court last year. This petition will be brought to CIDVC for comments on February 14, 2012.

Finally, Mr. Meltzer drew attention to other rules that may be of interest:

8. Other rules of interest

R-12-0001: Clarifies alternatives for review of informal sanctions.

R-12-0002: Allows law students to sit for a bar exam in February of their third year to obtain their results by the time they graduate.

R-12-0006: This petition from RCiP.LJC, which requests adoption of a new set of justice court rules of civil procedure, was previously vetted at a COSC meeting. First-round comments are due by March 16, 2012.

R-12-0020: Permits spouses of military personnel temporarily stationed in Arizona to apply for admission on motion if certain requirements are met.

Judge Mackey advised members that they can comment individually if they wish and that any proposals for the committee to take action must be submitted before the next meeting on May 18, 2012.

III. OTHER BUSINESS

A. Next Meeting Date

Friday, May 18, 2012

10:00 a.m. – 2:00 p.m.

Arizona State Courts Building

Conference Room 119 A/B

B. Good of the Order/Call to the Public

Motion: To adjourn, **Action:** Adjourn, **Moved by** Patricia Noland.

Motion passed unanimously.

Adjourned at 12:03 p.m.